

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has established a herniated disc causally related to factors of his federal employment.

## **FACTUAL HISTORY**

On October 2, 2015 appellant, then a 61-year-old former letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a disc herniation due to delivering letters and packages. He indicated that he first became aware of his claimed condition and its relationship to his federal employment on September 19, 2013. OWCP assigned the claim file number xxxxxx571. The employing establishment indicated that appellant retired, effective May 31, 2014.

The employing establishment, by letter dated July 14, 2015, advised that appellant had an accepted claim for his lumbar spine and “was only back at work for a few days from the earlier incident when the job factors made his back more painful.” It noted that OWCP had advised him to file an occupational disease claim “for this exacerbation.”

In a March 27, 2014 work capacity evaluation form (OWCP-5c), Dr. Robert Baylis, a Board-certified orthopedic surgeon, diagnosed lumbar strain and recommended continued physical therapy. He opined that appellant could perform his usual employment. In an April 1, 2014 work capacity evaluation form, Dr. Baylis found that he could work with restrictions.

Dr. Christopher Brown, a Board-certified orthopedic surgeon, in an April 17, 2014 work capacity evaluation form, provided work restrictions. In an accompanying referral form, he diagnosed lumbago.

By letter dated October 15, 2015, OWCP requested that appellant submit additional factual and medical information, including a detailed report from his attending physician addressing causal relationship between any diagnosed condition and the identified work factors.

In a report dated September 29, 2014, received by OWCP on October 23, 2015, Dr. Baylis obtained a history of appellant experiencing low back pain at work on September 19, 2013 “getting out of his truck multiple times.” He noted that imaging studies performed December 16, 2013 revealed degenerative changes and a herniated disc at L5-S1 on the right. Appellant returned to full-time employment after the September 19, 2013 incident, but experienced increased back pain. Dr. Baylis diagnosed low back pain, hip pain, and a prolapsed lumbar intervertebral disc at L5-S1. He related that appellant had “sustained an injury to his low back as a result of this work injury” and found work restrictions.

An October 19, 2015 magnetic resonance imaging (MRI) scan revealed grade 1 posterolisthesis at L3 on L5 and L5 on S1, a loss of disc height and hydration at multiple levels, a posterolateral disc bulge with facet arthropathy at L4-5 narrowing the bilateral neural foramina, and a right disc herniation effacing the ventral epidural fat and displacing the right S1 nerve root. It indicated that the findings were unchanged compared to a prior study.

A summary of investigative action by the employing establishment's Office of Inspector General discussed surveillance conducted on appellant from October 15 to 26, 2015.

In a report dated October 20, 2015, Dr. Richard M. Blecha, a Board-certified orthopedic surgeon, discussed appellant's history of low back pain due to a September 19, 2013 work injury. Appellant was diagnosed a herniated disc based on a lumbar spine MRI scan study and he was advised to work limited duty. Dr. Blecha discussed appellant's medical treatment after the September 19, 2013 injury. He noted that he injured his left shoulder in a November 2014 motor vehicle accident. Appellant questioned why his claim was accepted only for lumbar strain rather than a herniated disc and he filed an occupational disease claim. He retired in 2014 in part due to his pain with radiculopathy on the right. Dr. Blecha reviewed the medical evidence and diagnosed a herniated nucleus pulposus at L5-S1 on the right, lumbar degenerative disc disease, and lumbar spondylosis reflected as facet arthropathy.

On November 19, 2015 OWCP requested that Dr. Blecha review the statement of accepted facts and photographs and video evidence obtained by the employing establishment and address whether appellant had any continued residuals of the claimed September 19, 2013 work injury. It further asked that he provide his current diagnosis, extent of any disability, and his treatment recommendations.

By decision dated December 21, 2015, OWCP denied appellant's occupational disease claim. It found that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the identified work factors.

On January 11, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

Dr. Blecha, in a January 11, 2016 progress report, diagnosed a right herniated nucleus pulposus at L5-S1, lumbar spondylosis, lumbar degenerative disc disease, and lumbosacral degenerative disc disease. He advised that the appropriate diagnosis was a herniated disc rather than lumbosacral strain. Dr. Blecha noted that appellant had retired and was seeking medical treatment.

In a January 15, 2016 statement, counsel noted that appellant had two claims with September 19, 2013 as the noted date of injury, the current claim (OWCP File No. xxxxxx571) and OWCP File No. xxxxxx408. He related that appellant's back began to hurt on September 19, 2013 when he repeatedly got out of his work vehicle and later picked up parcels and tubs of mail. Appellant was instructed to file two claims. Counsel requested that OWCP consolidate the claims.

Appellant, in a statement received by OWCP on February 5, 2016, indicated that on September 19, 2013 he experienced back pain getting in and out of his vehicle delivering mail. The pain increased and he sought treatment at the emergency room. A physician diagnosed lumbar sprain but subsequent diagnostic testing revealed a herniated disc and lumbar spondylosis. He tried to work full duty but was unable to continue due to the pain. Appellant asserted that there should only be one injury claim for the September 19, 2013 incident.

At the telephone hearing, held on September 16, 2016, appellant described his work duties in his 28 years as a letter carrier. He related that he had pain getting in and out of his truck and lifting trays of mail on September 19, 2013. Appellant filed a claim for the September 19, 2013 work incident, to which OWCP assigned File No. xxxxxx408 and accepted for lumbar sprain. He did not understand why there was a second claim, as the incident occurred on September 19, 2013. Counsel asserted that the claims should be doubled.

By decision dated November 28, 2016, OWCP's hearing representative affirmed the December 21, 2015 decision. She found that the medical evidence of record did not establish that appellant sustained a diagnosed condition due to the implicated work factors. The hearing representative discussed appellant's assertion that the incident occurred during the course of one work shift on September 19, 2013, accepted by OWCP for a traumatic injury under OWCP File No. xxxxxx408. She instructed OWCP to combine the two case files, review the evidence, and issue a development letter to appellant explaining what he needed to submit to expand his September 19, 2013 traumatic injury claim to include additional conditions.

On appeal counsel asserts that OWCP did not double the case files as instructed by OWCP's hearing representative, nor did it consider the medical evidence from both records.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;<sup>7</sup> (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;<sup>8</sup> and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *See Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>7</sup> *Michael R. Shaffer*, 55 ECAB 386 (2004).

<sup>8</sup> *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>9</sup>

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>10</sup> must be one of reasonable medical certainty<sup>11</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>12</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant attributed his herniated disc to delivering letters and packages. OWCP accepted the occurrence of the claimed employment factors. The issue, therefore, is whether the medical evidence of record establishes a causal relationship between the claimed condition and the identified factors of his federal employment.

During the hearing, counsel advised that he had filed a traumatic injury claim for a September 19, 2013 injury, accepted by OWCP under File No. xxxxxx408 for lumbar strain. He subsequently filed an occupational disease claim under the current File No. xxxxxx571, alleging an employment-related herniated disc. Counsel advised that the injury occurred on September 19, 2013 and requested that the two claims be consolidated. In the November 28, 2016 decision, OWCP's hearing representative instructed OWCP to combine the case records for the current claim number and OWCP File No. xxxxxx408, and provide a development letter addressing claim expansion.

The Board finds that OWCP failed to double the case files as instructed by the hearing representative. OWCP procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further indicates that the cases should be doubled as soon as the need to do so becomes apparent.<sup>13</sup> Its procedures further provide for combining case files where correct adjudication depends on cross-referencing between files. For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required.<sup>14</sup> On remand, OWCP shall combine OWCP File No. xxxxxx408 with OWCP File No.

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<sup>9</sup> *Beverly A. Spencer*, 55 ECAB 501 (2004).

<sup>10</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>11</sup> *John W. Montoya*, 54 ECAB 306 (2003).

<sup>12</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management-Doubling Case Files*, Chapter 2.400.8(c)(1) (February 2000). See *T.M.*, Docket Nos. 09-1090 & 09-2226 (issued March 8, 2010); *D.C.*, Docket No. 17-0538 (issued June 27, 2017).

<sup>14</sup> *Id.* at Chapter 2.400.8(c) (February 2000); see also *J.M.*, Docket No. 13-1111 (issued July 15, 2013).

xxxxxx571. Following this and any necessary further development, OWCP shall issue a *de novo* decision on appellant's occupational disease claim for an employment-related herniated disc.

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 26, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board